

## BOOK REVIEWS

THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH. By Frank M. Coffin. Boston: Houghton Mifflin Company, 1980. Pp. xiv, 273. Price \$10.95.

COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS. By J. Woodford Howard, Jr. Princeton: Princeton University Press, 1981. Pp. xxvi, 415. Price \$32.50; paperback \$12.50.

ALVIN B. RUBIN †

Judges, wrote Professor Harry Jones, "are human beings, not *ex officio* members of the communion of saints, and they often have to hammer out by discourse decisions and doctrines that are not foreordained by anything written in the skies."<sup>1</sup> Yet the literature about judicial decision making generally reflects concern with "*the judge*" as either an ideal abstract or a specific personality. Little has been written about the development of doctrine by discourse. Even less has been written about either the *modus operandi* or the decisionmaking processes of the multiperson bench.<sup>2</sup> These vol-

---

† Circuit Judge, United States Court of Appeals for the Fifth Circuit. B.S. 1941, LL.B. 1942, Louisiana State University. Member, Committee on Court Administration, Judicial Conference of the United States.

The author wishes to express his appreciation for the assistance of his law clerks—Gregory J. Flemming, Wilbur Foster, and Lissa Lamkin.

<sup>1</sup> Jones, *Multitude of Counselors: Appellate Adjudication as Group Decision-Making*, 54 TUL. L. REV. 541, 547 (1980).

<sup>2</sup> There are a few helpful books and articles. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* (1976); D. KARLEN, *APPELLATE COURTS IN THE UNITED STATES AND ENGLAND* (1963); R. LEFLAR, *APPELLATE JUDICIAL OPINIONS* (1974); D. MEADOR, *APPELLATE COURTS—STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974); W. MURPHY & C. PRITCHETT, *COURTS, JUDGES, AND POLITICS* (2d ed. 1974); S. ULMER, *COURTS AS SMALL AND NOT SO SMALL GROUPS* (1972); Atkins, *Judicial Behavior and Tendencies Toward Conformity in a Three-Member Small Group: A Case Study of Dissent Behavior in the U.S. Court of Appeals*, 54 SOC. SCI. Q. 41 (1973); Friendly, *Of Voting Blocs, and Cabbages and Kings*, 42 U. CIN. L. REV. 673 (1973); Goldman, *Voting Behavior on the United States Court of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Goldman, *Voting Behavior on the U.S. Court of Appeals*, 60 AM. POL. SCI. REV. 374 (1966); Goldman, *Conflict on the U.S. Courts of Appeals, 1965-1971: A Quantitative Analysis*, 42 U. CIN. L. REV. 635 (1973); Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461; Heck & Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 J. POL. 852 (1981); Loeb, *Judicial Blocs and Judicial Values*, 14 AM. U.L. REV. 146 (1965); Murphy, *Courts as Small Groups*, 79 HARV. L. REV. 1565 (1966).

umes provide two vastly different perspectives on multiperson-bench decisionmaking.

Judge Coffin, a member of the United States Court of Appeals for the First Circuit, offers the thoughtful perspective of one member of an appellate bench. Although he comments on the court as a collegial body, he focuses on how one judge in one appellate court does his work. Professor Howard, a political scientist, covers a wider terrain. Examining the work of three large courts, the Second, the Fifth, and the District of Columbia Circuits, he analyzes and seeks to understand their functioning as institutions. Judge Coffin's analytical reflections are instructive to layman, lawyer, and fellow judge. Professor Howard's more ambitious and more scientific work, replete with data, is indispensable to those concerned with court administration. Those who are interested in understanding the work of appellate courts will find these works complementary and rewarding.

The judge and the political scientist draw their data from courts that are significantly different in size and territory. Judge Coffin's First Circuit consisted of only three active judges until 1980, when Congress authorized a fourth judgeship. The court is unique because it is a group so small that each judge becomes completely familiar with every other judge's personality, work habits, and predilections. The First Circuit bar knows the relative stability of the court's body of jurisprudence, and it is easy for that bar and for district judges to keep abreast of appellate opinions. Thus, there is little chance that a panel will make a vagrant decision without awareness of circuit precedent. This becomes even more apparent when one considers that the First Circuit decided only 333 cases in 1980.<sup>3</sup>

Because four judges can be arranged into only four different combinations of three judge panels,<sup>4</sup> lawyers can predict the identity of the judges likely to compose the court in a particular matter. Finally, the First Circuit's geographic area is the smallest of any federal appellate court save the District of Columbia Circuit.<sup>5</sup>

---

<sup>3</sup> ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS—1981, at 12. This figure is obtained by multiplying the number of "actions per panel after hearing or submission" by the "number of panels."

<sup>4</sup> The formula is the number of judges on the court ( $n$ ), multiplied by  $(n-1)$ , multiplied by  $(n-2)$ , with the product divided by the number in the panel, factorial ( $3 \times 2 \times 1 = 6$ ). Thus, the calculation for a four-judge court is  $4 \times 3 \times 2 \div 6$ .

<sup>5</sup> The circuit includes Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico.

All of the other circuits have so many more judges and so much larger and more diverse populations that they lack the advantages in maintaining decisional uniformity that the First Circuit enjoys. The Second Circuit, geographically adjacent to the First,<sup>6</sup> and the District of Columbia Circuit each has eleven judges, and the behemoth "old Fifth" had twenty-six until October 1, 1981, when it was divided into the "new Fifth"<sup>7</sup> and the Eleventh.<sup>8</sup> Even the "new Fifth" has fourteen judges, second only to the Ninth Circuit's twenty-three, and the Eleventh, with twelve judges, is massive for a newborn. Today the Fifth Circuit can be assembled into 364 different panels, and the Second and District of Columbia Circuits can be arranged into 165 panels.<sup>9</sup>

Finally, the number of cases decided in these courts dwarfs the First Circuit. The "old Fifth" decided 2440 cases in 1980, the Second 1051, and the District of Columbia 500.<sup>10</sup> Thus the sheer number of judges and the volume of opinions in these larger circuits makes decisional uniformity within the circuit difficult, if not impossible, to achieve. Uniformity is made even more impractical in these circuits because of the large number of unpublished opinions.<sup>11</sup>

Lawyers in the Second, Fifth, and District of Columbia Circuits, then, cannot predict with any certainty which judges will sit on their panel. They can know only that in a difficult case involving important policy decisions the result is likely to differ if the panel hearing arguments is composed of judges "Steady," "Slow," and "Cautious" rather than judges "Innovative," "Activist," and "Impatient." Yet because of the Supreme Court's limited review capacity, the decisions of circuit courts are final in over ninety-eight percent of the cases.

In short, unless there are factors that stabilize and unify the larger circuit courts, there is the danger that they will cease to

---

<sup>6</sup> The Second Circuit includes New York, Vermont, and Connecticut.

<sup>7</sup> The new Fifth Circuit includes Texas, Louisiana, and Mississippi.

<sup>8</sup> The Eleventh Circuit includes Alabama, Florida, and Georgia.

<sup>9</sup> See *supra* note 4.

<sup>10</sup> See *supra* note 3.

<sup>11</sup> Over half of the opinions in the Second and Fifth Circuits, for example, are distributed only to the litigants. For a discussion of the policy problems involved in deciding whether and which opinions to withhold from publication, see Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978). See also Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807; Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977); Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977).

function in steady orbit and instead will become clusters of decision-makers periodically brought together, then separated to regroup in perpetual meteoric paths.<sup>12</sup>

Understanding how panels make decisions and evaluating the legal doctrine announced by these panels are not matters merely for satisfying curiosity or even for verifying jurisprudential theories. Comprehension of the process is essential to those seeking to understand and to follow legal doctrine. It is also imperative to those who, as judges, seek to achieve a degree of decisional uniformity and to avoid the spectacle of a host of panel decisions, each of which is almost surely the final word in a given case, flying erratically through the circuit.

Judge Coffin's book takes us through the decisionmaking process in the First Circuit. Despite all of the differences between the First and other circuits, the operations of his court and all others are much alike.<sup>13</sup> Therefore, every lawyer who plans to file a federal appeal should read this book for an understanding of how appellate judges decide cases. Every judge should read it for the pleasure that any craftsman takes in seeing how another professional describes his role. Every layman interested in the judicial process should read it for an understanding of the fundamentals of appellate jurisprudence, and for its beautiful style and marvelous sense of intimacy.

The first part of the book, entitled *A Separate Way*, introduces the concept of an appellate judiciary. It recounts some of the concerns in judging judges, the appellate idea in history and in the United States, and the elements of deciding appeals. These are laymen's basics. The five chapters of Part II, *Work Ways*, describe the place and patterns of an appellate judge's work—where it is done, and exactly how.

The final part of the book, *Thought Ways*, considers the decisionmaking process. Judge Coffin has exceptional qualifications for trying to tell readers how the elements of judging—logic, insti-

---

<sup>12</sup> Judge Hill chose another metaphor to illustrate the peril:

If we give only lip service to the rule that one panel is bound by prior panel decisions, we run the risk of transforming what has heretofore been an orderly institution into an inconsistent, unpredictable body, made up of three-judge panels that resemble waterbugs chasing each other around and around the surface of a summer pond.

*Gates v. Collier*, 616 F.2d 1268, 1283 (5th Cir. 1980) (dissenting opinion), modified *per curiam*, 636 F.2d 942 (5th Cir. 1981).

<sup>13</sup> My own experience and my conversations with judges on other circuit courts convince me that the method of decisionmaking Judge Coffin describes is a reasonably accurate paradigm of the ways of a typical circuit judge and circuit court.

tutional competence, legal principles, social values—join together and lead the individual judge to a decision in a difficult case. He was a practicing lawyer and a member of Congress, and he held a major executive post as foreign aid administrator. He has served as an appellate judge for fifteen years, nine of them as Chief Judge. Yet the third part of his book offers no insight into the formula for judging, saying only that it remains “unrevealed.”<sup>14</sup> I would have welcomed some suggestion, however tentative, of Judge Coffin’s personal thoughts about how to decide such cases.

For it is clear that most cases are not decided merely by mechanically setting them beside the measure contained in the common law. Some judging *is* almost mechanical, because many appeals do not involve issues considered debatable even by the untutored. Other cases are governed by a prior decision of the circuit. Still others are decided by statutes clear in application; the legislature has weighed the social and political values, and the court’s role is only to execute the legislative judgment.

But large numbers of appellate decisions do not lend themselves to categorical resolution even with the help of infinitely resourceful computers. For these cases, the sociological school of jurisprudence has given us the thesis that decisionmaking is not the result of the application of rules, but of conscious and unconscious result-oriented forces. The subconscious may mask its work, but it is difficult for one who has attempted to discern the factors affecting his own decisions to accept the idea that legal doctrine, professional standards of craftsmanship, and the formulation of a rationale for the decision are all delusions or, worse, charades.

Legal realism, the opposite of the mechanistic theory, may accurately describe some judicial phenomena, but it cannot establish universal principles. Realism’s fundament is that decisions are made for unannounced, largely ideological reasons, perhaps solely to reach a desired result. Such factors are undoubtedly present, and significant, in dealing with issues at the center of social and legal ferment. Judges’ attitudes toward a close issue of sex discrimination or toward the exclusionary rule in criminal cases may be divined from their social and political philosophies—although this is not the same as saying that their decisions are caused by and are simply efforts to implement their philosophies. Even in such areas, however, three judges cannot join in a decision that is based on cloaked purposes unless, consciously or unconsciously,

---

<sup>14</sup>F. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL BENCH* 245 (1980).

explicitly or tacitly, they agree to conceal their real motives. Legal realists have not fully accounted for this process.

Indeed, legal realists and Judge Coffin share a failing in that they attempt only to discern how judges as individuals work out their decisions. They inform us little about how three judges work together. Professor Howard's work in this regard is seminal. After devoting the first part of his book to the role of courts of appeals in the governing process and the flow of federal litigation, he turns to the making of circuit judges, the purposes of courts of appeals, judicial values and judicial votes, consensus and conflict in circuit courts, and leadership in the allocation of work. Finally, he offers perspectives on reforming the system.

Professor Howard observes that courts gain cohesiveness in approach to cases because "however idiosyncratic and fortuitous their occupational histories, three interrelated processes in the making of circuit judges—recruitment, socialization, and professionalization—tend to filter into these tribunals judges of similar mold."<sup>15</sup> "[P]rofessional competence—or at least the reputation for it—is a prerequisite for circuit judgeships."<sup>16</sup> In most cases, then, these professionalized, socialized creatures from basically similar backgrounds react alike. But this observation demands a return to the question that Judge Coffin's work leaves unanswered: what "guides a circuit judge's conception of judicial duty when rules and roles are unclear?"<sup>17</sup>

In a splendid chapter, *Judicial Values and Judicial Votes*, Professor Howard considers the factors affecting case outcome, including the role of precedent, the likely result of decision, and the intuitive sense of justice. Although appellate judges may be victims of self-delusion, few regard their jobs as innovative.<sup>18</sup> Most important in their conscious evaluation of decisional factors are "precedent, when clear and relevant," and "common sense," followed by "per-

---

<sup>15</sup> J. HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 87 (1981).

<sup>16</sup> *Id.* 93.

<sup>17</sup> *Id.* 167.

<sup>18</sup> Professor Howard states that, "by any external standard," the amount of conflict that actually exists on circuit courts is "not much." *Id.* 193. For example, the dissent rate in the Second Circuit during the period Professor Howard studied was 3.2%, in the Fifth Circuit 1.4%, and in the District of Columbia Circuit 9.8%. The overall dissent rate averaged 4%. *Id.* 193-97 & Tables 7.1, 7.2, 7.3.

Despite judges' generally held view that their jobs are not innovative, and the relatively low dissent rate on courts of appeals, the determination of what factors guide judges in hard cases is critically important. For public clashes may not reflect the full magnitude of internal disharmony, particularly over the appropriate judicial role. As Professor Howard notes, the dissent "represent[s] the end rather than the beginning of the conflict-resolution process." *Id.* 193.

sonal views of justice in the case." Far behind in importance, but also influential, are "respect for the judge below," "public needs and demands," and "anticipated response of the Supreme Court."<sup>19</sup>

The outcome in a case, then, does depend on the composition of the panel because each judge weighs these criteria differently. To Professor Howard the greatest surprise is that judges' voting records along the "liberal-conservative" spectrum are more consistent with their role orientation than with their pre-judicial political attitudes.<sup>20</sup>

Professor Howard identifies these role orientations by dividing the thirty-five judges he interviewed into three categories. Five judges considered themselves "innovators," "obliged to make law whenever the opportunity occurs."<sup>21</sup> Nine considered themselves "interpreters," limited to interpreting the law or, at most, legislating only for the particular case.<sup>22</sup> Most judges took an intermediate position, which Professor Howard calls "realism." These judges are "pragmatic problem solvers," "willing to fill power vacuums," but careful to initiate legal change in "the professional way."<sup>23</sup>

Professor Howard concludes:

The paradoxical results were to intensify ideological conflicts in a few policy fields, notably civil rights and criminal justice, but to diffuse conflict in most. Converging political and professional values made agreement the norm in the great mass of cases; ideological differences tipped the balance at policy outcroppings, where open roles and close cases made personal preferences permissible guides to decision. The net effect was to narrow the range of circuit conflict and of necessary Supreme Court intervention to control the policy premises of subordinates. In the compatibility of professional and political values, more than their antagonism, lay the reconciliation of their roles and the cohesion of national courts.<sup>24</sup>

The observations may be provocative rather than conclusive, but Professor Howard's many remarkable conclusions about the working of federal appellate courts should serve as a point of departure for others. Professor Howard has studied the appellate process and what he terms "decision by discourse." Others should

---

<sup>19</sup> *Id.* 164 & Table 6.7.

<sup>20</sup> *Id.* 176.

<sup>21</sup> *Id.* 160.

<sup>22</sup> *Id.* 162.

<sup>23</sup> *Id.* 163.

<sup>24</sup> *Id.* 185 (footnote omitted).

now consider how, in appellate decisionmaking, two primary factors interact: the decision itself and its rationalization in an opinion.

Judges, unlike scientists, cannot test a hypothesis by experiment. They cannot subject the experiment to verification by repetition, thus determining whether the result will be the same when their colleagues replicate the experiment. Judges' laboratories are their efforts to explain their decisions in a manner that will win the considered acceptance of other esteemed persons.

Most of us, conditioned by our professionalism, our background, and our ideals, have had an experience that Judge Coffin describes. We read the briefs, we study the record, we decide that we will affirm or reverse, and we undertake to prepare an opinion stating the decision and its rationale. We find that "it won't write"—our jargon for saying that we cannot prepare an opinion reaching the desired result in acceptable professional form. We start over, and we find that our second opinion not only reaches an opposite result, but that it also conforms to our jurisprudential standards. By this time, the result that we originally rejected appears correct. Our colleagues, who were also originally prepared to reach a contrary result, accept our effort, and it becomes the court's opinion. In short, the discipline of opinion writing does affect the result.

Of course, it is possible for an opinion to obscure rather than clarify, by merely reciting quotations from other cases without revealing the judges' underlying thoughts and motives.<sup>25</sup> Such an opinion may either indicate or conceal the reasons for the decision. It tells us little about the author except his or her adeptness with a copying machine and transparent tape, today's mechanical improvements on scissors and paste.

Another factor in the decisional process that deserves more analysis is the effect of the judges' view of the appellate function on the result reached by appellate courts. Professor Howard does review the difference between the perception that the court of appeals sits principally to achieve a just result in the case before it and the contrasting view that the primary appellate function is the clarification, development, and application of doctrine. The various circuits are similar in their work methods, but the reversal rate in 1980 in the First Circuit was 18.2%, in the Second Circuit 13.2%, and in the Third Circuit 20.9%.<sup>26</sup> It is hard to account

---

<sup>25</sup> Justice Cardozo referred to this sort of opinion as the "tonsorial" style. B. CARDOZO, *LAW AND LITERATURE* 31 (1931), *reprinted in* *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 338, 352 (M. Hall. ed. 1947).

<sup>26</sup> *ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS—1980*, at 1-3.



for this variation—a reversal rate over 50% higher in the Third Circuit than in the Second, and 15% higher in the Third than in the First—by assuming that district judges in the Third Circuit commit reversible errors twice as often as their colleagues in the adjacent circuit. What are the reasons for these differences? Are they to be found in the jurisprudential or political attitudes of different appellate judges? Is the greater rate of reversal a reflection of different social values? Or does it reflect different views of the fact-trier's function? Seeking the answers to these questions will help us understand not only the thought ways of appellate judges, but also the functioning of our judicial process.

Judge Coffin's reflections will help lawyer, layman, and judge alike to understand better how federal appellate courts operate and how a judge on those courts works. In these respects it is invaluable. Perhaps someone else will now analyze more incisively how the final results of these operations are achieved.

Professor Howard's study is panoramic. It is unfortunate that much of his data was, for reasons he explains, taken from 1965-1967 statistics. The workload of appellate courts has increased dramatically in the intervening fifteen years and many judges think that its characteristics have also altered. There are new faces on the bench and some new procedures have developed. The book would be even more valuable had it been possible to base it on current data. This, however, is a minor and perhaps inescapable flaw in a work that is as challenging as it is comprehensive.

Felix Cohen wrote, "[l]aw is not a mass of unrelated decisions nor a product of judicial bellyaches. Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls."<sup>27</sup> All of us, those who decide and those who are affected by the decisions, require more understanding of the processes of decisionmaking and opinion writing. These two books break ground for those that will undoubtedly follow to help us explore the mental processes of the individual judge, the interaction of judges sitting in panels, the effect of the opinion writing process on decision-making, and the candor of the decisional reasons set forth in the formal opinion.

---

<sup>27</sup> Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

THE NATURE OF LAW. By Alan Watson. Edinburgh: Edinburgh University Press, 1977. Pp. 148. Price \$8.50.

HANS OBERDIEK †

What is law? Pontius Pilate had little time for a similar question about truth, and it is unlikely that busy attorneys will find much time for philosophical disquisitions concerning the nature of law. Nonetheless, those who ignore such questions do so to their own detriment, for one's conception of law will certainly affect one's understanding of what one is doing, whether it is worth doing, and what one is becoming in the process. Only if one believes that theory is irrelevant to practice can one sustain a dismissive attitude towards inquiries into the nature of law. And such a belief would itself embody claims regarding the relationship of thought and action that would require justification.

Despite its importance, legal philosophy is not treated with much seriousness in most American schools of law. Jurisprudential considerations enter the curriculum systematically primarily as adjuncts to other subjects. Courses devoted to philosophy of law and jurisprudence are, when available, almost always optional, and are often taught by professors whose primary professional interests lie elsewhere. And for those who are convinced that legal philosophy is an essential part of a legal education, there is the additional problem of accessibility: so much that has been written recently is arcane, obscure, incestuous, or polemical that even an eager student hardly knows where to begin.

Alan Watson's *The Nature of Law*<sup>1</sup> provides a provocative starting place: it is short, to the point, and presupposes only a basic knowledge of alternative legal philosophies. The book's thesis is emphatically presented, and will both attract and repel those acquainted with modern philosophy of law. Professor Watson brings impressive credentials to his study. He is an authority on Roman law,<sup>2</sup> and has also explored the ways in which custom becomes law, how laws are exported from one legal system to another,<sup>3</sup> and how

---

† Professor of Philosophy, Swarthmore College. B.S. 1959, Ph.D. 1965, University of Wisconsin.

<sup>1</sup> A. WATSON, *THE NATURE OF LAW* (1977).

<sup>2</sup> See A. WATSON, *LAW MAKING IN THE LATER ROMAN REPUBLIC* (1974); A. WATSON, *ROMAN PRIVATE LAW* (1971); A. WATSON, *THE LAW OF THE ANCIENT ROMANS* (1970).

<sup>3</sup> A. WATSON, *LEGAL TRANSPLANTS* (1974).

legal change occurs generally.<sup>4</sup> He is undoubtedly familiar with the leading contemporary legal theories on both sides of the Atlantic.

The bulk of *The Nature of Law* is devoted to Watson's elaboration and defense of a single, complex proposition:

The argument of this book is that the distinguishing and sole necessary feature of law is the availability of an institutionalised process, which has the essential function of resolving actual or potential disputes, by means of a decision, with the specific object of inhibiting further unregulated conflict.<sup>5</sup>

Along the way, Watson examines: the essential function of legal processes; the essence, typical attributes, and particular virtues of law; the relationship between law, order, and authority; the role of legal rules, and respect and obedience for law. *The Nature of Law* therefore represents a very ambitious undertaking, for its central aim is no less than to supplant prevalent legal theories with a novel approach that retains what is valuable in its rivals without succumbing to their one-sidedness. For the sake of clarity, I will begin with a sketch of Watson's general position before examining his approach, assumptions, and argument in detail.

The only essential function of the legal process, according to Watson, is to inhibit potential conflict by settling actual disputes.<sup>6</sup> More specifically, this essential function has three components: law serves to "institutionalise disputes, validate the decisions given in the process and inhibit unregulated conflict."<sup>7</sup> In Watson's view, because order—rather than freedom, justice, or morality—is the essence of law, legal rules do not inevitably reflect the political, social, and economic needs and desires of the society as a whole or its ruling elite.<sup>8</sup> The distinguishing and sole necessary feature of law, then, is an institutionalized process by which a dispute can be resolved. More basically, it is the possibility or threat of recourse to that process that furthers the essential function of inhibiting conflict.<sup>9</sup>

In Watson's scheme, legal rules are needed for two reasons: to activate the process, and to validate—but not necessarily determine—the resulting decisions.<sup>10</sup> Although Watson argues that

---

<sup>4</sup> A. WATSON, *SOCIETY AND LEGAL CHANGE* (1977).

<sup>5</sup> A. WATSON, *supra* note 1, at i.

<sup>6</sup> *Id.* 13. For a discussion of how the legal process is involved in resolving potential disputes, see *id.* 18-19.

<sup>7</sup> *Id.* 71.

<sup>8</sup> *Id.* i.

<sup>9</sup> *Id.* 45.

<sup>10</sup> *Id.* i.

no other features or functions of law and the legal process are essential, he does recognize that there are several typical attributes of law, and especially of the laws of mature legal systems. The most important of these typical attributes are that "they form part of a system that is more or less all-embracing, they are created by a recognisable person or body that has the power to make law, they are authoritative and authoritarian, they are backed by regulated sanctions, and they receive obedience."<sup>11</sup> Watson argues that the prime virtue of law is to offer a readily available dispute-resolution process,<sup>12</sup> and that certain of these attributes further that end: "it is a particular virtue for law to be formally enacted and published, for its application to be within the financial and other means of the parties affected, and for the legal rules to be clear."<sup>13</sup> Finally, to fulfill its essential function, law must have recognized authority in resolving disputes. Such authority derives both from the potential use of force and from respect for the law.<sup>14</sup>

Although he recognizes his intellectual debts to competing theories, Watson distinguishes his theory from its rivals. Contrary to natural law theorists, Watson declares that law as it is should be sharply separated from law as it ought to be. Watson accepts that law and morality interact, but not as classical or contemporary proponents of natural law claim. Unlike legal positivists, he attaches the status of law to both international and primitive law because, despite their lack of some or even all of the attributes and virtues of law, both can and often do possess its sole necessary feature. And contrary to Marxists and proponents of other theories viewing law as a means of social control, Watson maintains that law often bears scant relation to the interests and power of the ruling elite. In large part the law is firmly in the hands of lawyers, who have their own interests and power!

Because Watson situates his own theory in the midst of its three principal rivals, I shall consider the strengths and weaknesses of each, as Watson sees them, before examining the alternative that he offers.

## I. THREE THEORIES OF LAW

### A. *Natural Law*

Of the three theories of law that Watson considers, natural law has by far the oldest and most distinguished pedigree, and

<sup>11</sup> *Id.* 48.

<sup>12</sup> *Id.* 61.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* 71.

Watson traces it to its ancient Greek roots. Cicero provided the first systematic statement of this theory:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to to [sic] alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.<sup>15</sup>

Aquinas developed the theoretical foundations of the theory and pointed out its chief implications; indeed, natural law in its Thomistic form remains the principal theory of law and morals of the Roman Catholic Church. Because of its centrality to Roman Catholic thought, natural law continues to influence both jurisprudential reflection and legal practice throughout the world.

Any ship that has picked up philosophical baggage in as many ports as natural law has will inevitably have run a shifting course. Yet the general direction of this theory has remained remarkably constant. Three principal theses—each expressed in the passage quoted from Cicero—can be identified. First, natural law is universal and unchanging: everyone, everywhere, is bound by it at all times. Second, natural law is “higher” law; it is superior to man-made, positive law because it derives from a superior source: nature, reason, or God. None of this would be of much import, however, unless the content of natural law could be known. So the third thesis is that natural law is discoverable by reason, properly educated.

From these theses, natural law theorists have drawn several highly significant corollaries. To the old question whether law is discovered or made, the proponent of natural law has an un-

---

<sup>15</sup> CICERO, *DE RE PUBLICA DE LEGIBUS* 211 (C. Keyes trans. 1948).

equivocal answer: the first principles and chief implications of law are discovered by reason, not made by fiat. This corollary, however, does not mean that there is no room for legislative and judicial innovation and discretion. Indeed, in every system of natural law, and especially in Aquinas's, great legislative responsibility is left to the good sense of men. Categories of law reserved to human decision include "rules of the road," offences that are merely *mala prohibita* (such as failure to apply for a vendor's license), and significant determinations of morally sanctioned institutions (for example, specific rules of inheritance).

Most natural law theorists also maintain that grossly unjust law is not law: *lex iniusta non est lex*. And if a statute, decree, or regulation does not represent true law, it is not legally binding. A morally repugnant statute is not bad law; it is not "law" at all. Depending on the kind and degree of injustice perpetrated under the color of law, one may have a moral obligation to obey the statute, but certainly not a legal obligation. According to Aquinas, for example, one may have a moral obligation to obey an unjust decree to avoid scandal or to prevent the collapse of civil order; even these rationales have limits, however, for one is never justified in obeying a decree requiring one to act contrary to the explicit word of God.<sup>16</sup>

By demanding that statutes must not conflict with natural law, natural law theorists provide a framework for powerful attacks on morally corrupt statutes. Similarly, natural law theory provides a basis for defending those statutes regarded as morally acceptable. But what considerations determine whether a particular statute accords or conflicts with natural law? According to the tradition, natural law requires legislators, judges, and rulers to promote the common good; that is, those conditions—as discovered by practical reason—that enable all members of society to realize their human potential. The nature and purpose of law is therefore to give detailed structure to the common good and to determine justifiable means for its pursuit.

The attractions of natural law theory are undeniable. It provides, within the concept of law itself, a moral basis for criticizing and defending statutes. It links law with an order that is natural, rational, and/or divine. And it supplies a satisfying ground for both legal obligation and the rule of law. To many, however, the defects of natural law theory have appeared incorrigible.

---

<sup>16</sup> T. AQUINAS, *Summa Theologica*, in 2 THE BASIC WRITINGS OF SAINT THOMAS AQUINAS 793-95 (A. Pegis ed. 1945).

Watson's criticisms reflect two of the recurring major problems with natural law:

How can a resolution that is passed in the same way as law and is enforced in the same way as law, and is treated by the state as law, reasonably be claimed not to be law? Why can one not admit it is law but bad law? Secondly, to determine whether a resolution is or is not law how can one appeal to a standard outside the political structure that passed the resolution? And how can one agree on the outside standard to which appeal is to be made?<sup>17</sup>

Watson, like the positivists,<sup>18</sup> insists on drawing a sharp and deep distinction between law as it is and law as it ought to be. As revealed in his first question, Watson criticizes natural law theory for failing to identify and understand all law. His approach is that of an anthropologist who casts about for a neutral, descriptive theory of law, rather than a normative, evaluative, or prescriptive analysis.

Watson's criticisms highlight the contrasts between his perspective and that of proponents of natural law. Natural law theorists might argue, however, that their theory was never intended to be a descriptive tool for legal anthropologists, but rather was designed to provide a systematic statement of what law must be if it is to meet the requirements of practical reason. Thus, Watson and his natural law opponents disagree partly because their respective aims and concerns are so different. Yet there is more to the disagreement than that. The advocate of natural law views law from an *inner* standpoint. From this vantage, the necessary interrelationships among rationality, community needs, and the interests and aspirations of individuals become apparent. Natural law theorists argue that to look at law only from the outside as an anthropologist does, examining the shared characteristics of law as it is, unavoidably distorts these critical elements. Whether this allegation can be sustained against Watson's analysis will be considered later.

Watson's cursory and scattered remarks on natural law reveal that he views its disdain for the "is/ought" distinction as its critical flaw. By ignoring this distinction, he asserts, adherents of natural law fall into confusion. Why, he asks, are natural law theorists "so insistent that the rules and principles with which they are

---

<sup>17</sup> A. WATSON, *supra* note 1, at 1-2.

<sup>18</sup> Watson recognizes his intellectual debt to the positivists, although he explicitly distinguishes his theory from that of the intellectual heirs of John Austin. See, e.g., *id.* 46.

concerned are rules of law and not simply rules of morality"?<sup>19</sup> Watson suggests that part of the answer is that they believe "there is an overriding obligation to obey law—which must mean all valid law—which is different in character from the obligation to behave morally."<sup>20</sup> Limiting their analysis of law to only that which imposes this significant obligation, natural law theorists fail to account for much of the legal rules and processes recognized by societies as law throughout history. Another result of their failure to recognize this distinction is uncertainty in the determination of what is law. Natural law scholars "appeal to a standard external to the political structure to determine what is law and what is not."<sup>21</sup> But, according to Watson, there is no agreement "as to what this external standard is, and how appeal should be made to it."<sup>22</sup> Watson believes that legal theory gains clarity, scope, and persuasiveness from concentrating on man-made law.

What, then, does Watson salvage from the natural law tradition? In attempting to rationalize the natural law "belief that a man-made rule that is immoral cannot be law," Watson suggests

that law . . . is an organ of the state or group, hence discontent with law brings one into emotional conflict with the moral authority of the state; that law has an inherent tendency towards the moral; and that law is society's attempt to institutionalise justice.<sup>23</sup>

States have moral authority because they claim it for themselves; how much of this is deceptive will vary widely. Law has an inherent tendency towards the moral for the simple reason that it promotes order, and "[o]rder is itself not a neutral quality but is a *prima facie* good."<sup>24</sup> Another reason why morality seems to be an essential part of law is that law is society's way of institutionalizing justice: "The state seems to hold the ring between the quarrelling parties and fixes fair rules. In a criminal trial, the force or violence backing the law is very obvious; and so it should be. It is a basic part of justice in common morality that retribution follows wrongs."<sup>25</sup>

---

<sup>19</sup> *Id.* 122.

<sup>20</sup> *Id.* 122-23.

<sup>21</sup> *Id.* 16.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* 124.

<sup>24</sup> *Id.* 125.

<sup>25</sup> *Id.* 126.



But Watson ultimately rejects natural law's thesis that law and morality are intertwined. What Watson means by justice, morality, and kindred terms is far removed from anything natural law scholars would recognize:

We must . . . be clear as to what is here meant by justice and morality. We are not talking in terms of an abstract theory known to and appreciated by only a few philosophers, but of what people *feel* and *declare* to be just whether or not they base themselves on any explicit theory.<sup>26</sup>

Watson thus reveals himself to be an ethical relativist: morality is merely what people feel or declare to be just, not what is just. Watson opts for relativism, I think, because of a deeply rooted skepticism regarding the possibility of formulating and defending a set of sound moral principles. Very early in *The Nature of Law* he states: "it should be emphasised that no agreement [on an external standard of natural law] has been reached, and there seems no way in which agreement can ever be reached."<sup>27</sup> Watson never explains why agreement provides either a necessary or sufficient criterion of soundness. Indeed, were consensus elevated to such a role, it would prove disastrously unsuitable, for we would be driven to skepticism even in the natural sciences, let alone in the social sciences and legal theory. Although he fails to justify either his relativism or his skepticism, I believe that both explain why Watson has no alternative but to adopt the stance of the puzzled outsider looking in. And this leads to some confusion in his own ideas, as when he writes: "Nonetheless, it should again be stressed that law and justice have no inevitable connection, and that in no sense is the doing of justice an essential function of positive law, whether of the rules of law or of the legal process."<sup>28</sup>

What does this even mean? Is Watson saying that there is no inevitable connection between what people feel and declare to be law and justice, or between law and justice per se? And what does "inevitable" mean here: a connection people recognize, or one that obtains, whether or not recognized? A natural law adherent would maintain that the doing of justice is and must be an essential purpose of law, while recognizing that law often fails to secure this aim. Analogously, one aim of formal logic is to formulate valid

---

<sup>26</sup> *Id.* 125 (emphasis added).

<sup>27</sup> *Id.* 2.

<sup>28</sup> *Id.* 126-27.

rules of inference, although this aim is not always realized. Consequently, just as there are numerous unsound rules of law, so there remain invalid rules of inference.

Watson also mischaracterizes natural law theorists' understanding of justice and morality. He poses a false choice between "an abstract theory known to and appreciated by only a few philosophers" and "what people feel or declare to be just." Contrary to Watson's portrayal, those who maintain that moral judgments can be justified do not demand that anyone accept any "abstract theory" of their justification. Rather, they argue only that we recognize the moral requiredness of certain precepts, such as that no one defraud, calumniate, or bear false witness against another, or that no one kill, maim, or enslave another at will. Each of these directives, and others, needs further elaboration and defense, and that has been provided for centuries by those untainted by any "abstract theory." Indeed, it is the metaethics of relativism that has the appearance of an abstract theory appreciated by only a handful of advanced thinkers.

Many contemporary natural law theorists would regard Watson's account of natural law theory as seriously misleading. For example, John Finnis, in his defense of the doctrine,<sup>29</sup> denies most of the claims Watson makes about natural law. Finnis contends that critics who depict natural law theory, in its classical formulations, as connecting "what is" to "what ought to be" are misguided.<sup>30</sup> He also argues that natural law, contrary to popular images, does not posit that ethical norms are to be inferred from facts, speculative principles, or metaphysical propositions about human nature; rather, the first principles of natural law are self-evident and indemonstrable.<sup>31</sup> Similarly, Finnis disagrees with Watson's notion that proponents of natural law assert that bad law is not law at all,<sup>32</sup> that there is an overriding obligation to obey all valid law,<sup>33</sup> and that there is no rational, nonrevelatory way to determine the central precepts of natural law.<sup>34</sup> Finnis argues persuasively that many of these errors could have been avoided had proponents and critics of natural law alike concentrated on the

---

<sup>29</sup> J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

<sup>30</sup> See, e.g., *id.* 55 n.6 (criticizing R. UNGER, *LAW IN MODERN SOCIETY* 79 (1976), and Weinreb, *Law as Order*, 91 *HARV. L. REV.* 909, 911 (1978)).

<sup>31</sup> *Id.* 33.

<sup>32</sup> See *id.* 363-64.

<sup>33</sup> See generally *id.* 297-350.

<sup>34</sup> See generally *id.* 388-98.

writings of Aquinas, rather than relying on those of Grotius<sup>35</sup> as Watson does. But this is not the place to explore Finnis's defense; suffice it to say that natural law appears much more plausible and palatable than Watson's sketch would lead one to believe.

### B. *Law as Social Control*

Watson also compares his theory of the nature of law with those that picture law as a means of social control. Marxists, as Watson points out, are most prominently associated with this doctrine, but it is not the private property of Marx, Engels, and their heirs. Watson points, for example, to the related ideas of Friedrich von Savigny, Rudolf von Ihering, Roscoe Pound, and A.S. Diamond, and he could also have mentioned Emile Durkheim, Max Weber, Talcott Parsons, H.A. Hayek, and Roberto Unger. Watson describes this shared viewpoint:

All these theories are united in the basic tenet that law stands in a close rational or *the* natural (inevitable) relationship with society, to the needs or desires of the people or its ruling élite. Most of them, however, also postulate or allow for some divergence of law from these needs or desires.<sup>36</sup>

According to these theorists, then, societal conditions, such as economics, religion, history, and politics, will determine the legal rules and processes.

Although Watson explicitly attacks these theorists, his own position follows their common approach in significant respects. Proponents of law-as-social-control theory study law in terms of its functional relationship to a particular society. These theorists argue that law serves to further the interests of the ruling group, often at the expense of the rest of the population. Watson certainly recognizes the functionalist approach of this group. Unlike natural law, he writes, "Law as Social Control is concerned not with [the problem of the source of validity of law,] but with the function of law or the source of the content of law."<sup>37</sup> In his

---

<sup>35</sup> See, e.g., *id.* 38-48.

<sup>36</sup> A. WATSON, *supra* note 1, at 85.

<sup>37</sup> *Id.* 4. This point is of critical importance. If it were firmly grasped, many disputes would be seen for what they are: appeals to redirect legal thinking, categories, methods, and research programs. Arguments about "the nature of law" obscure this. Had Watson himself traced the implications of his distinction, perhaps he would have been more charitable to natural law. He might have seen, for instance, that the choice between his own approach and that of natural law depends in large part on one's purpose in constructing a theory of law—even a descriptive theory.

criticisms of this theory, Watson underplays the similarity to his own theory: in Watson's scheme, too, the essence of law is seen largely in terms of its function.<sup>38</sup> Watson's emphasis, like that of law-as-social-control theorists, is on what law does.

If Watson's theory thus has affinities to law-as-social-control theory, why does he reject it? The main objection Watson offers to law-as-social-control doctrine, especially in the Marxist version but also in its other forms, is that the theory does not accurately describe historical reality, because law does not always serve the interests of the ruling elements in a society: "not only are many legal rules socially neutral, but also . . . largely as the result of inertia, a very great deal of law is and remains badly out of step with the needs and desires of both society and its ruling élite."<sup>39</sup> This inertia exists, according to Watson, because "the essential function of a rule is served whether or not the rule is the best possible provided only that it does not offend too greatly against the ethic or the power base."<sup>40</sup> In Watson's view, then, Marxism and other variants of law as social control fail as general theories because "they try to impose a pattern that does not exist. . . . The accuracy of the theories must be tested against the social facts, not by their intellectual neatness."<sup>41</sup>

Watson's dispute with Marx's followers, at this level anyway, turns on the extent to which there are legal rules that operate contrary to the interests of the ruling class. Watson recognizes that Marxists are not committed to the proposition that *every* statute, decree, or regulation necessarily serves, or is even intended to serve, the interests of the ruling class. He writes: "Most [Marxist theorists], however, also postulate or allow for some divergence of law from [the needs or desires of the people or its ruling elite]. . . . Among Marxists, Engels claimed that law seeks an internally coherent expression and thus fails to be a faithful reflection of economic conditions."<sup>42</sup> Although Watson thus realizes that these theories do attempt to account for some improper fit between law and ruling class interests, he argues that the amount of divergence that actually exists<sup>43</sup> undercuts the validity of the theory.<sup>44</sup>

<sup>38</sup> See *infra* text accompanying notes 55-62.

<sup>39</sup> A. WATSON, *supra* note 1, at 3-4.

<sup>40</sup> *Id.* 22.

<sup>41</sup> *Id.* 86.

<sup>42</sup> *Id.* 85-86.

<sup>43</sup> The extent of this divergence is a factual issue that is beyond the scope of this essay.

<sup>44</sup> See A. WATSON, *supra* note 1, at 87-95.

Watson's criticism of the concept of law as social control fails to account for modern interpretations of this theory. First, most contemporary Marxists would regard lawyers as part of the ruling elite. It would not be surprising, then, that many laws would favor lawyers' interests at the expense of others in the ruling elite. Second, most modern-day Marxists reject the early formulation of their theory under which law was viewed as only part of the superstructure of society, and not also part of the substructure, for law necessarily enters into the organization of production.<sup>45</sup> Thus, Watson's criticisms are more telling with respect to traditional than modern formulations of law-as-social-control theory.

### C. *Legal Positivism*

Natural law may be the oldest, and Marxism the most iconoclastic, theory of law, but surely positivism is the most deeply entrenched. Because it is so well known, only a brief description is necessary. Watson correctly states that positivists

insist that a rule is law precisely because it is created and accepted as such by a particular human society. On this approach the morality or immorality of a rule or any supposition of divine origin is irrelevant to the question whether the rule is or is not a legal rule.<sup>46</sup>

Watson points out that John Austin, a seminal positivist thinker, "defined law as the general commands of a sovereign, supported by the threat of sanctions."<sup>47</sup>

Watson levels three objections at positivism. First, he objects that neither international nor "primitive" law fits easily within the positivist concept of law. Second, he argues that custom that becomes law cannot properly be regarded as a command of a superior. Third, and most importantly, Watson claims that positive law does not reveal anything about the purpose or function of law, and is not designed to study these important elements of the nature of law.<sup>48</sup>

Unfortunately, Watson's objections apply not so much to positivism as to the Austinian version of it. This particular version has been pretty well discredited, in large part because of the in-

---

<sup>45</sup> For an elaboration of this and other defenses of a general Marxist perspective, see G. COHEN, *KARL MARX'S THEORY OF HISTORY* (1978).

<sup>46</sup> See A. WATSON, *supra* note 1, at 2-3.

<sup>47</sup> *Id.* 51.

<sup>48</sup> *Id.* 3.

fluent work of the leading contemporary positivist, H.L.A. Hart.<sup>49</sup> In a footnote, Watson acknowledges that Hart's attack on the classic positivist view is "compelling," and that Watson's second objection does not apply to Hart's own position.<sup>50</sup> Watson's first objection does not quite hit the mark either. Hart does not totally exclude international law or primitive law from his understanding of the nature of law. As to international law, Hart explores the "sources of doubt" concerning its status and concludes, with Bentham, that it is "sufficiently analogous" to municipal law to "make the lawyers' technique freely transferable from the one to the other."<sup>51</sup> Hart's position as to whether "primitive law" is indeed law is unclear. He seems, however, to think that primitive law is defective—because it lacks "a rule of recognition"<sup>52</sup>—rather than nonexistent. Watson's third objection also misfires, because it is really a complaint that positivists are not exploring a different line of analysis. It is true that Hart and his followers, such as Joseph Raz,<sup>53</sup> believe that the analysis of legal concepts and systems divorced from historical, sociological, and moral inquiries is not only possible but desirable. But they would not deny that some other approach might also be worthwhile. Indeed, they themselves occasionally indulge in such inquiries!

Watson does acknowledge that competing theories—natural law, positivism, and law as social control—have all contributed to the ideas he presents in *The Nature of Law*.<sup>54</sup> The considerable intellectual debt he owes to the latter two theories will become more apparent as we now turn to a more detailed examination of his own provocative theory.

## II. FUNCTIONALISM

Watson proposes to grasp the nature of law by exploring its function. He begins by distinguishing three distinct meanings of "function." Watson first presents the classical functionalist view of Radcliffe-Brown, according to which the function of any recurrent activity denotes "the part it plays in the social life as a whole and therefore the contribution it makes to the maintenance

---

<sup>49</sup> See, e.g., H. HART, *THE CONCEPT OF LAW* (1961).

<sup>50</sup> A. WATSON, *supra* note 1, at 129 n.12.

<sup>51</sup> H. HART, *supra* note 49, at 231.

<sup>52</sup> *Id.* 89-92.

<sup>53</sup> See, e.g., J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2d ed. 1980).

<sup>54</sup> A. WATSON, *supra* note 1, at 1.

of the structural continuity.”<sup>55</sup> As Watson notes, this perspective intentionally excludes any notion of purpose. Many sociologists and anthropologists have repudiated this approach, and Watson mentions one reason: it cannot easily account for social change. He does not, however, explore the other theoretical problems of functionalism, such as that: not all institutions have useful or beneficial effects; not all of the effects of useful institutions are themselves useful, and not all beneficial effects are functions.

Watson describes and discusses two other functionalist approaches. Function can be defined in terms of intended purpose. Although Watson himself favors this construct,<sup>56</sup> he levels a powerful objection at it:

If, in discussing what an institution does, one introduces the idea of what it is intended to do one has to grapple with the problem that intention may be manifest or latent, explicit or implicit, conscious or unconscious, impossible or realistic. What people say they intend may not be what they actually do intend, and they may actually intend what is impossible of achievement. . . . [I]n the final analysis, what the institution is intended to do can only be judged by what it actually does.<sup>57</sup>

Function can also be analyzed teleologically; that is, in terms of laws that express the tendency of a system to maintain its goal-state. However, Watson dismisses this notion and its near relatives with little discussion or argument. More will be said about this approach shortly.<sup>58</sup>

Given Watson's reservations about each of these possible meanings of “function,” it is surprising that, in the end, he embraces all three. “In this book,” he declares, “I will use the word ‘function’ not only to mean what an institution does, but to express the idea of what an institution is intended to do, and can do.”<sup>59</sup> Watson maintains that his account of law and the legal process can be readily formulated in terms of each approach, but emphasizes that he believes that human purpose is essential to understanding social institutions.

Surely Watson's all-encompassing definition of function is a mistake. First, Watson goes beyond the classical definition of func-

---

<sup>55</sup> A. WATSON, *supra* note 1, at 4 (quoting A. RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 180 (1952)).

<sup>56</sup> *Id.* 5.

<sup>57</sup> *Id.* 4-5.

<sup>58</sup> See *infra* text following note 66.

<sup>59</sup> *Id.* 6.

tion by including anything that an institution does. Radcliffe-Brown, for example, does not equate "function" with what a recurrent activity does *simpliciter*, but with its contribution to continuity.<sup>60</sup> Not everything an activity or institution does can be counted as its functions. Further, Watson's promiscuous position must end in confusion and obscurity, for what an institution is intended to do seldom bears much resemblance to what it actually does or contributes, if anything, let alone what it potentially could do. Given Watson's account, consider what the "functions" of law schools might be!

As we have seen, Watson is convinced that law has the one essential function of resolving disputes with the specific object of inhibiting further unregulated conflict.<sup>61</sup> The legal process may, and typically does, fulfill other functions as well, but this is its sole *essential* function.<sup>62</sup> Watson reaches this conclusion by a process of elimination: six candidates are considered, and all but one are rejected.<sup>63</sup> Some possible functions of a legal process are rejected because they do not apply to international or primitive law; others are discarded because they do not apply to trial by combat, and still others are thrown out because the characteristics of entire classes of legal processes undercut the importance of certain functions. The one function common to all of the legal processes Watson considered is that of resolving disputes with the specific object of inhibiting further unregulated conflict.

If one insists on talking in terms of essential functions, it would be better, even for a descriptive theory, to look at the functions of a mature, flourishing legal system, not of a legal system that is defective or rudimentary in critical respects. It is not merely that we are primarily interested in these central cases, but that deviant or underdeveloped institutions can only be understood adequately by relating them to what they may become. We would see, I believe, that law relates to a certain kind of order, an order that at least embodies Hart's "minimum content of natural law"<sup>64</sup> and perhaps also Fuller's "eight demands of the law's inner morality."<sup>65</sup> It would be better yet to set aside the search for any

<sup>60</sup> See A. RADCLIFFE-BROWN, *supra* note 55.

<sup>61</sup> See generally *supra* text accompanying notes 6-14.

<sup>62</sup> By an "essential" function Watson means "one whose failure cannot be structured into the system or whose constant failure cannot be accepted as tolerable." A. WATSON, *supra* note 1, at i.

<sup>63</sup> See *id.* 8-13.

<sup>64</sup> See H. HART, *supra* note 49, at 189-95; *infra* note 83.

<sup>65</sup> L. FULLER, *THE MORALITY OF LAW* 46 (2d ed. 1969). See generally *id.* 33-94.



single essential function, and look instead at the basis of functional explanations and how they relate to ascriptions of functions. For function statements and functional explanations are as intriguing as they are baffling.

A function statement ascribes a function to something, as when we say that it is a function of the heart to pump blood. Function statements are explanations, but not necessarily functional explanations, for it is not unusual for a function statement to explain *what* something does without explaining *why*, and only the two together comprise a functional explanation. In order for a function statement to explain *why*, it must explain that whatever has the specified function exists in order to perform that function. A functional explanation of the heart, for example, must specify not only the function of the heart, but also that mammals have hearts *because* they pump blood.

Functional explanations are therefore a subclass of teleological explanations: <sup>66</sup> explanation not in terms of mechanistic operations, but in terms of the result of an object's relationship to some end.<sup>67</sup> Unlike the teleological explanation described by Watson, however, functional explanations need not express the tendency of a system to maintain its goal-state—they may explain what leads the system to change its goal-state. In addition, functional explanations differ from classical teleological explanations in that they need not make any reference to the conscious plans of an intelligent designer.

The functionalist perspective just described faces formidable problems. Given that not all useful or beneficial effects, much less all effects, can be designated as functions, how do we determine which are and which are not functions? We have also seen that only some function statements constitute functional explanations. To make any progress, we must inquire, however briefly and sketchily, into the structure of functional explanation.<sup>68</sup>

Function statements are functional explanations only when they answer a "why" question as well as a "what" question. But this, though true, is not very informative. For a somewhat fuller answer, we must introduce the twin notions of consequent explanations and consequence laws. G.A. Cohen defines a consequence law as "a universal conditional statement whose antecedent is a

---

<sup>66</sup> See *supra* text following note 57.

<sup>67</sup> A good introduction to the philosophical issues involved in functional and purposive explanations may be found in Beckner, *Teleology*, in 8 *ENCYCLOPEDIA OF PHILOSOPHY* 88-91 (1967).

<sup>68</sup> For a useful bibliography on the topic of functional statements and explanations, see G. COHEN, *supra* note 45, at 356-61.

hypothetical causal statement.”<sup>69</sup> A consequent explanation relies on consequence laws, and can take the following form: if it is true of an object *O* that if it were *F* at  $t_1$ , it would, as a result, be *E* at  $t_2$ , then *O* is *F* at  $t_3$ .<sup>70</sup>

It might appear that consequent explanations purport to explain causes by their effects, but in this case appearances are deceiving. This can be best grasped by considering an appropriate example: let *O* = a particular society, *F* = “law-governed,” *E* = “inhibition of unregulated conflict,” and  $t_1 = t_2 = t_3$ . The resulting consequent explanation would read as follows: If it is true of a particular society that if that society were law-governed at a certain time it would be able to inhibit unregulated conflict at that time, then that society *was* law-governed at that time. The effect—the inhibition of conflict—does not explain the existence of the cause—law. Rather, the existence of law is explained by a dispositional fact about society *O*: that unregulated conflict would be inhibited if the society were to have law. It is explanatory to cite the effect of the law, not because its effect explains the law—which is nonsense—but because the effect of inhibiting conflict permits us to infer two important propositions about society *O*: (a) that the conditions of society *O* were such that law would have this inhibiting effect, and (b) that these conditions caused the existence of law. In terms of this discourse, functional explanations are simply those consequent explanations that introduce functions (rather than something else) as the *explananda*.

Functional explanations bristle with difficulties. Are dispositional causes ever basic, or are they always reducible, if only in principle, to episodic causes? Can dispositional causes ever provide either necessary or sufficient explanations? Can dispositional causes overcome the considerable difficulties faced by all counterfactuals? Can functional explanations ever be confirmed? Are any functional explanations true? These questions bedevil all attempts to construct functional explanations; no attempt will be made to answer them here. Instead, we shall assume that the notions of function statement and functional explanation are tolerably clear and plausible, and try to determine Watson’s position with respect to them.

Throughout his book, Watson ascribes functions to law, the legal process, and rules rather freely, even indiscriminately. But

<sup>69</sup> *Id.* 259.

<sup>70</sup> *Id.* 260-61.

this by itself does not establish that he provides us with any putative functional explanations, because it is not clear that he is trying to explain the existence of these items by reference to their functions. Perhaps, like many sociologists and anthropologists, he believes that an explanation of the function of something is *ipso facto* an explanation of its existence. If so, he is mistaken.<sup>71</sup> Further evidence must be adduced to answer the "why" question.

Marx and his followers have attempted to do just that. They have offered functional explanations of the existence of law, explanations that specify dispositional facts about the tendency of societies at certain stages of development to create legal systems because those systems reinforce and give expression to the interests of the dominant class. It may be impossible for an explanation along these lines, even when suitably qualified, to account for all the facts. But it will not be refuted by showing, as Watson attempts to do, that *some* laws are dysfunctional or even that *some* societies—especially those in highly unusual circumstances—develop legal systems for quite different reasons. For a Marxist explanation need only account for the *tendency* of societies at certain stages of development to develop legal systems of a particular sort. Watson's criticism of Marxist functional explanations are, however, worth pursuing and developing, because they do undermine a crude Marxist view.

Is law best explained functionally? And, if so, which functional explanation appears most convincing? These large questions will not be pursued here. A great deal of careful philosophical investigation must take place before we can be confident that functional explanations are sound. One approach, of course, would be to explore the presuppositions and implications of those explanations, such as Marx's, that have been elaborated and defended. But the Marxist's functional explanation is not the only candidate in the field. Watson could, I think, develop his into another. And still another variety explains law not as a technique of social control, but rather as a way of structuring society to enhance human development. On this account, law as a technique to inhibit conflict would be viewed as a less mature stage in the development of a flourishing legal system.<sup>72</sup>

---

<sup>71</sup> There is no clear textual answer to the interesting question whether Watson believes that the existence of law has a functional explanation in addition to its functions. I suspect that he fails to address the question because he is unaware of both the distinction it presupposes and the question's importance.

<sup>72</sup> For my suggestions along this line, see Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71 (1976).

### III. METHODOLOGICAL POSTURES

#### A. *Watson's Methodological Essentialism*

Underlying Watson's focus on the "function" of law, and to a large extent predetermining the narrow scope of his functionalism, is his adoption of what he calls "methodological essentialism."<sup>73</sup> Although he refuses to define or justify this theoretical approach,<sup>74</sup> it is possible tentatively to reconstruct his meaning of this term. Watson appears to endorse philosopher Karl Popper's understanding of essentialism<sup>75</sup>—although Popper himself, along with Wittgenstein, opposes this method of study.<sup>76</sup> Popper writes that "methodological essentialis[m] was founded by Aristotle, who taught that scientific research must penetrate to the essence of things in order to explain them."<sup>77</sup> Watson's book exemplifies this approach. He searches for those features that all laws share and without which law would not be law. Similarly, essential functions are identified. According to Watson, "[t]he search for the essential function is . . . a search for the minimum function. That function will be what law must perform if it is to be law."<sup>78</sup> Watson thus seems to reject an alternative definition of essentialism, deriving from Locke,<sup>79</sup>

<sup>73</sup> A. WATSON, *supra* note 1, at 131 n.28.

<sup>74</sup> Watson writes:

[S]ince Popper declares that the problem at issue . . . is 'one of the oldest and most fundamental problems of philosophy' . . . and that among social scientists there is no very energetic opposition to essentialism . . . , I hope it will be understandable and excusable if I do not feel obliged to justify methodological essentialism.

*Id.* (citations omitted).

<sup>75</sup> Acknowledging that his approach centers on a search for the essence of law, and endorsing the use of a historical methodology for the study of social groups, Watson states: "I must concede that my approach is realist or essentialist, on Popper's terms." *Id.*

<sup>76</sup> Watson implies that Popper opposes methodological essentialism because it leads to historicism, *id.*, and that Wittgenstein opposes it because of its futility, *id.* 6. Unfortunately, Watson does not adequately develop these views. Popper does oppose historicism, which he defines as "an approach to the social sciences which assumes that *historical prediction* is their principal aim, and which assumes that this aim is attainable by discovering the 'rhythms' or the 'patterns', the 'laws' or the 'trends' that underlie the evolution of history." K. POPPER, *THE POVERTY OF HISTORICISM* 3 (3d ed. 1961) (emphasis in original). But Popper does not oppose the historical study of social groups. And Wittgenstein opposes a search for essences because he believes it is more fruitful to look for "family resemblances." See L. WITTGENSTEIN, *PRELIMINARY STUDIES FOR THE 'PHILOSOPHICAL INVESTIGATIONS'* [THE BLUE AND BROWN BOOKS] (2d ed. 1969).

<sup>77</sup> K. POPPER, *supra* note 76, at 28.

<sup>78</sup> A. WATSON, *supra* note 1, at 8 (footnote omitted).

<sup>79</sup> See J. LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 295-317, 438-71 (P. Nidditch ed. 1975); J. MACKIE, *PROBLEMS FROM LOCKE* 72-106 (1976).

which posits that the essence of a set of objects is that which all objects of the set share and which explains the co-occurrence of their properties.<sup>80</sup>

Methodological essentialism almost certainly leads to distorting simplification because of its overemphasis on the least common denominator. Recall the fruitless, although occasionally humorous, quests to find a single common element possessed by all humans. Further, Watson appears to confuse a *necessary* condition for the existence of something with its *essence*. For example, he writes: "An essential function is defined as one whose failure cannot be structured into the system *or whose constant failure cannot be accepted as tolerable.*"<sup>81</sup> The presence of oxygen is a necessary condition of human life, but is hardly its essence. Methodological essentialism, moreover, blurs the distinction between essence and identification. A single feature, such as a set of fingerprints, may serve to identify a particular person without defining his essence; such a feature may be a *consequence* of his nature, rather than its essence. Finally, one may suspect that those who opt for methodological essentialism already have chosen their quarry and are simply laying self-fulfilling traps to snare it. Would Watson, for example, have arrived at the same conclusion if he had considered international law a caricature or primitive law a parody?

### B. *An Alternative Approach*

An alternative method of examining the nature of law, suggested by Wittgenstein and pioneered among legal scholars by Hart, offers greater hope of success. This method has three principal features: centering attention upon the practical point of law; examination of the "central case" and "focal meaning"; and selection of a viewpoint.<sup>82</sup>

Generally, the first of these features means that scholars concentrate on the practical functions of law in a society.<sup>83</sup> Watson

---

<sup>80</sup> For example, typical samples of gold are yellow and malleable, melt at a certain temperature, and have a certain density. The essence of gold under this approach would be the feature that all pieces of gold share and that explains both the typical characteristics—the yellowness, the malleability, the melting point, and the density—and the fact that in most or all samples of gold these qualities occur together. One candidate for the essence of gold under this approach is the atomic structure of gold. Yellowness would not be the essence of gold, even though all gold is yellow.

<sup>81</sup> A. WATSON, *supra* note 1, at i (emphasis added).

<sup>82</sup> For a detailed description of the features of this alternative approach, see J. FINNIS, *supra* note 29, at 6-18.

<sup>83</sup> Finnis describes Hart's notion of the practical point of law as follows: Law is to be described in terms of rules *for* the guidance of officials and citizens alike, not merely as a set of predictions of what officials will

does examine the practical point of law when he specifies that the object of law is the inhibition of unregulated conflict. Yet one may question whether he goes far enough, for law does not seem to be just *any* way of inhibiting conflict. To understand just how Watson fails to emphasize adequately the practical point of law, a little further elaboration of Watson's argument is necessary.

To some extent, Watson's theory does recognize that law is a particular way of lessening disputes. In detailing his argument, he says that law settles disputes by an institutionalized process and validates decisions in terms of rules. Watson enumerates some particular characteristics:

[A] process will tend to have some formalities, there will be some regularity in handling dispute situations, there will be an absence of total arbitrariness from the procedure or from the decision or from both, and those involved in a process . . . will treat the dispute-solving with an air of seriousness.<sup>84</sup>

Watson's analysis of legal rules illustrates his failure to pay proper attention to the practical point of law. Because he does not try to understand how legal rules guide "officials and ordinary citizens," giving them "*practical reason for compliance*" with law,<sup>85</sup> he fails to account fully for the substantive role legal rules play in the legal process. According to Watson, legal rules are required to validate decisions but not to determine them. A judge, for example, must cite appropriate rules in defense of his decision and exude an air of seriousness, but it is not legally objectionable for him actually to base his decision on class interest, personal preference, or prejudice. To Watson, then, legal rules merely ra-

---

do. A legal system is a system in which 'secondary' rules have emerged *in order to* remedy the *defects* of a pre-legal regime comprising only 'primary rules'. Law must have a minimum content of primary rules and sanctions *in order to* ensure the survival of the society or its members and to give them *practical reason for compliance* with it.

*Id.* 7 (footnote omitted) (emphasis in original).

<sup>84</sup> A. WATSON, *supra* note 1, at 39.

A legal process, however, need not be part of a legal system, though typically it will be. As long as there is one validating legal rule with its appropriate process, law exists. But Watson never explains why this cannot properly be considered just a simple system. Of a hypothetical Eskimo group that had but one legal rule, for example, Watson asserts: "[t]hat rule can properly be regarded as law, but it is difficult to imagine it forming or being part of a legal system." *Id.* 49. The issue, however, is not one of imagination but of purpose. What is gained, or lost, by counting the example alternatively as a case of a prelegal system, a rudimentary legal system, or a legal process sans system? Not much.

<sup>85</sup> J. FINNIS, *supra* note 29, at 7 (emphasis in original); *see supra* note 83.

tionalize the decisions that inhibit conflict; the legal principles recited need not actually determine the outcome.<sup>86</sup>

More careful attention to the practical point of law might have moved Watson closer to a position like that of Joseph Raz. Raz, like Watson, believes that law is a societal technique for settling disputes authoritatively. But Raz emphasizes that law accomplishes this through rules that are legally binding both on law-making and law-applying individuals and institutions, on the one hand, and on law-receiving individuals and institutions, on the other hand.<sup>87</sup> As a result of his distorted perspective, Watson has very little to say about the way rules guide the conduct of ordinary citizens, except as they enable people to avoid or gain access to the legal process.

The deficiency of Watson's account of rules shows up in another way. Although he is preoccupied with the function of law as a method of social control, he does not satisfactorily differentiate the ways in which this can be accomplished. Lon Fuller provides a needed corrective. Fuller distinguishes social orderings where rulers exercise "managerial direction" over their subjects from societies in which legal rules are followed:

The directives issued in a managerial context are *applied* by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not *apply* legal rules to serve specific ends by the law-

---

<sup>86</sup> What leads Watson to this remarkably cynical view? I think that there are two causes. First, there are certain processes that Watson wishes to call law, but which he believes do not provide rational means of arriving at truthful decisions. Trial by combat—especially where the disputants supply surrogates—is such a process. Watson could, of course, deny that trial by combat is a legal process even though it is a way of settling disputes. Because trial by combat may serve to inhibit further unregulated conflict, Watson could have examined the practical point of this legal process by inquiring into the participants' justifications for their actions. Proponents of trial by combat might have had a theory that convinced them that the process secured just outcomes. Perhaps they thought that God would enable the person in the right to win—nations, after all, have often espoused a similar view.

A second reason why Watson discounts the substantive role of legal rules is that judicial decisions often seem to bear little resemblance to the rules that validate them; it is natural, consequently, to assume that they do not determine the decisions. But, as Hart's practical approach suggests, the most critical question is how the matter looks to those involved in the dispute, especially to those engaging in reasoned argument. Do they regard rules as legally binding, or as mere sop to advance the cause of their client or to make a decision acceptable? If it is the latter, as Watson might suggest, then it is difficult to make much sense out of claims of legal right or out of judicial deliberations and critical reactions, except as either cunning charades or the products of vast self-delusion. This troubling implication is precisely the problem that has prevented orthodox legal realism from gaining plausibility as a general theory of law.

<sup>87</sup> See, e.g., Raz, *The Institutional Nature of Law*, 38 MOD. L. REV. 489 (1975).

giver, but rather *follows* them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed.<sup>88</sup>

Legal rules are distinguished from managerial directives, then, by their generality and, more importantly, by the nature and scope of the obligation to obey. Following this distinction, "primitive" law will often be excluded from the sphere of law, because it is largely managerial. Within this narrowed range, the role of legal rules may be much more substantial than Watson describes. It is only because Watson fails to pay proper attention to the practical point of law, including the obligations of citizens, that he can argue that rules do not determine legal outcomes. In Fuller's analysis, legal rules are inextricably connected with determining or reaching decisions, not merely with making them acceptable.

If legal rules do determine decisions, then in pursuing the practical point of law one must single out which features are significant for a descriptive theory of the nature or function of law. And this, in turn, involves identifying the "focal meaning" of law. The device of focal meaning, John Finnis explains,

involves a conscious departure from the assumption . . . that descriptive or explanatory terms must be employed by the theorist in such a way that they extend, straightforwardly and in the same sense, to *all* the states of affairs which could reasonably, in non-theoretical discourse, be 'called "law"', however undeveloped those states of affairs may be, and however little those states of affairs may manifest any concern of their authors . . . to differentiate between law and force, law and morality, law and custom, law and politics, law and absolute discretion, or law and anything else.<sup>89</sup>

Finnis's remarks are directed towards Hans Kelsen, but they apply with equal force to Watson. We can follow Finnis in calling what

<sup>88</sup> L. FULLER, *supra* note 65, at 207-08 (emphasis in original).

<sup>89</sup> J. FINNIS, *supra* note 29, at 9-10 (emphasis in original).



is referred to by the concept of law in its focal meaning the "central cases." These will be the legal systems of nations that strive, albeit imperfectly, to operate according to the rule of law. This distinction will enable us to differentiate

the mature from the undeveloped in human affairs, the sophisticated from the primitive, the flourishing from the corrupt, the fine specimen from the deviant case, the 'straightforwardly', 'simply speaking' . . . , and 'without qualification' from the 'in a sense', 'in a manner of speaking', and 'in a way' . . . —but all without ignoring or banishing to another discipline the undeveloped, primitive, corrupt, deviant or other 'qualified sense' or 'extended sense' instances of the subject-matter . . . .<sup>90</sup>

But how should we actually select the significant features? It is not enough to spurn Watson's least-common-denominator approach; something better must be put in its place. Obviously, the viewpoint from which to select these features is that which makes the most sense in determining the practical point of law. And here there are two longtime rival approaches, each of which sees law as a technique of control pertaining to order. Watson belongs in the first camp, along with such disparate thinkers as Austin, Holmes, Hart, and Marx. They argue that law pertains to social order *simpliciter*. Aristotle, Cicero, Aquinas, Fuller, Dworkin, and Finnis, among others, reside in the rival camp. They maintain that law pertains to a social order of a certain sort: a *moral* order.

From either of these two viewpoints, certain cases will be seen as undeveloped, primitive, corrupt, or deviant. But especially with respect to the "corrupt" and "deviant" classifications, the cases will almost certainly be sorted differently. Which point of view is preferable, and why, remains a, if not the, perennial question in philosophy of law. It is important, I believe, not to ignore it, even if it means being less than generous to certain problematic cases.

#### IV. LEGAL PROCESS AND LEGAL RIGHTS

In Watson's scheme, the legal process is called into play by claims of legal right, power, or privilege.<sup>91</sup> Watson maintains that it is precisely the availability of a process to resolve disputes that

---

<sup>90</sup> *Id.* 10-11.

<sup>91</sup> A. WATSON, *supra* note 1, at 28.

makes a right uniquely legal.<sup>92</sup> We are left to infer that other types of rights, and particularly moral rights, do not have an institutionalized process of dispute resolution available to them. This would help explain why so many claims of moral right go unheeded.

As is also true of many other assertions in *The Nature of Law*, Watson's claims regarding the nature of legal rights are suggestive but undeveloped. Watson sees quite clearly that rules create legal rights, that such rights are logically prior to any legal process, and that the creation of legal rights may be unrelated to the settling of disputes. Regrettably, Watson feels compelled nonetheless to assert, without offering adequate support, that all legal rights must be enforced by an appropriate legal process.

Without doubt, there could not be an effective system of legal rights without the availability of a dispute resolution process. But what must be true of a system, much less a presumptively effective system, need not be true of each of its parts. Because he defines legal rights only in terms of their use within a dispute resolution process, Watson confuses the identity and existence of legal rights with their effectiveness. An account of legal rights that does not regard the availability of a dispute resolution process as essential would recognize this important distinction. Legal rights could then be explicated in terms of entitlements, that is, claims justified within a system of legal rules. Moral rights could then be distinguished as claims justified on the basis of moral principles. Putative moral rights—and even legal rights, for that matter—may be problematic, controversial, or nonexistent. Nevertheless, this does not justify confusing questions of identity and existence with questions of effectiveness.

#### V. LAW AND LEGAL PROCESS

Watson's adoption of methodological essentialism, and the consequent narrowness of his approach to the function of law, limit both the generality of his theory of law and the validity of his conclusions. This is preeminently true with respect to his analysis of the internal workings of legal systems. Where Watson focuses on the interrelationships among legal systems, however, his analysis and conclusions are both thought-provoking and suggestive, though incomplete. These consequences of Watson's narrow methodological posture will be examined in this section by concentrating on several interesting and important portions of his overall argument and conclusions.

---

<sup>92</sup> *Id.* 42.

### A. *Legal Rules and Legal Process*

Just as Watson argues that there are no legal rights in the absence of legal processes to effectuate them, he also argues that rules become law only when disputes are institutionalized and a process exists for their resolution: there can be no legal rules without legal process. Watson admits that much modern legislation—regulatory provisions, for example—seems remote from legal process. Nevertheless, he argues that always “the possibility of a process is there . . . and if a dispute arose the norms set out in these laws would appropriately be used both to initiate the process and to validate any decision given in the process.”<sup>93</sup> Watson here again confuses identity and existence with effectiveness, just as he does in his analysis of legal rights.

Perhaps the most noticeable deficiency in Watson’s account of legal rules is his failure to discuss the internal structure of legal systems. Watson thus shows that he is indifferent, if not hostile, to much that has been written under the separate but related banners of legal positivism and analytical jurisprudence. As we have seen, Watson is much less concerned with analysis of internal relations than with understanding the functional dynamics of legal process.<sup>94</sup> This concern and attention provides a much needed supplement to the preoccupations of such philosophers as W.N. Hohfeld, A.L. Goodhart, H.L.A. Hart, Hans Kelsen, and Joseph Raz. Yet this omission at the same time diminishes the attractiveness of Watson’s offering as a *general* theory of law.

### B. *The Scope and Purpose of Legal Process*

Watson vacillates somewhat about whether the legal process aims only to inhibit future, unregulated conflict, or whether it also seeks to resolve existing disputes. He ultimately argues only for the former, but why not have both, and more? In reality, law sometimes inhibits future conflict, sometimes resolves existent disputes—and sometimes permits or even encourages conflict! Watson’s quest for a *single* essential element thus once again prevents him from acknowledging the complex aims of law.

Watson’s refusal to accept arbitration as a form of legal process is also troubling. Because nonbinding arbitration yields only a recommendation, Watson maintains that it is not part of the legal process. “[T]here is no decision saying ‘this is the case’ or ‘you

---

<sup>93</sup> *Id.* 32.

<sup>94</sup> See *supra* text accompanying notes 55 & 61-63.

must do this'. The claim that initiates a legal process also demands a decision, not a recommendation."<sup>95</sup> Perhaps this is so, but Watson offers little support for the proposition beyond its assertion. Is a decision always required? In certain states, such as Wisconsin, the Attorney General may offer nonbinding but legally influential opinions on certain controversial, yet unlitigated, legal issues. Such opinions are authorized by legal rules and often given weight in subsequent judicial opinions. Given that these opinions are more influential than recommendations, yet are surely not decisions, they would seem to be excluded from Watson's scheme of things. But is there any better reason for this exclusion than that they would disturb the scheme?

### C. Law and Coercion

Law is backed by recognized authority, and so it must be if it is to fulfill its functions, Watson argues. In his view, authority consists of two elements: force and respect. Law and force are not, he argues, necessarily enemies, for law is unlikely to be effective unless it is supported by the threat of force. This is especially true with respect to the legal systems of nation states. Watson goes so far as to contend that law does not cease to be law even when it requires the backing of enormous violence.<sup>96</sup>

Watson's discussion of the authority of law is at once problematic and insightful. Contrary to his argument, law that requires enormous force to keep it alive is law only in an attenuated sense, for such law is moribund. Perhaps it can be revived and restored, but if we are to call it "law" despite its grossly deformed state, we should add "in a sense," or "sort of." Only then could we say, for example, that Uganda had a legal system during the final years of Idi Amin's reign of terror.

Watson does make the point, which is an advance over the views of such sophisticated positivists as Hart and Raz, that the concepts themselves of law and legal system do not require regulated sanctions. At least in theory, he says, "[i]nternational law enables us to envisage . . . a system of law not at all backed by violence, whose existence rests on acquiescence and respect coupled with non-violent sanctions."<sup>97</sup> This is true, and is also important in that it invites us to perceive that inducements, as well as sanctions, can support law—even the law of nation states.<sup>98</sup>

---

<sup>95</sup> A. WATSON, *supra* note 1, at 59.

<sup>96</sup> See generally *id.* 70-82.

<sup>97</sup> *Id.* 80.

<sup>98</sup> See generally Oberdiek, *supra* note 72.

Respect is the other element of authority. Watson argues that law does not require consent or acceptance; at the very most it demands acquiescence. From the citizen's point of view, this need mean no more than that he fears the superior force of the state. Watson views that situation, however, as a degenerate case. He explains the more typical forms that respect for law can take:

Respect for law because it is law means, on the one hand, that we can envisage legal systems (though not of a nation state) which are not backed by force; on the other, that (for instance, in a nation state) the great extent to which law's validity depends on force is masked.<sup>99</sup>

Regrettably, Watson again concentrates only on appearances: "We will be concerned not with factors which show that law *is* worthy of respect but factors which either demonstrate that law is *thought* to be worthy of respect or derive from such *feelings* of respect."<sup>100</sup> As argued earlier,<sup>101</sup> this is a misguided approach, whether's one's intent is to describe or prescribe.

#### D. *Legal Transplants*

Watson's discussion of legal transplants highlights his interest in and insight into the history and sociology of law, and is one of the best parts of his book. Because law is primarily developed by lawyers, Watson argues, it is often borrowed from other systems where models are readily available. The society that borrows conserves its own resources, and benefits from the quality and prestige of the laws of the exporting systems. These benefits are especially substantial, according to Watson, if the transplant has the authority of Roman law behind it.

The transplanted law is frequently second best, if not second rate, for the borrowing system, however, for it will seldom precisely fit the needs of either the society as a whole or of its ruling elite. Because so much Roman law in particular survives in contemporary legal systems, Watson disputes the Marxist claim that every stage of economic development carries with it its own unique legal system. Watson's generally realistic theory of law is supported by the observation that societies often import laws that are less than optimal for them:

Society has the ability to tolerate a great deal of law that is not the best that can be devised for that society, and

---

<sup>99</sup> A. WATSON, *supra* note 1, at 114.

<sup>100</sup> *Id.* 114-15 (emphasis added).

<sup>101</sup> See *supra* notes 17-35 and accompanying text.

knowledge of the deficiencies does not automatically cause intolerance. It appears that to a considerable extent what matters more is that there are rules than that the rules are the best suited for that society.<sup>102</sup>

After questioning the suitability of certain legal rules for their particular societies, Watson rather complacently concludes that daily courtroom battles to determine the best legal rule to apply in a particular case may be a poor use of society's resources:

If the argument is correct it should mean that it is not necessarily very important for society that a judge in a lawsuit get his law right . . . . It is important that the attempt be made to get the law right (or cynicism will ensue), and that the decision be acceptable. But what is of significance is that the law best suited for a society's needs is by no means inevitably that which exists in the society, and, to the extent that it is not, the expenditure of great effort in a law suit to achieve the legally correct result may be a misuse of resources.<sup>103</sup>

Watson's analysis and conclusions regarding legal transplants are provocative and are worth further investigation and reflection.

#### VI. THE UNDEVELOPED POTENTIAL OF WATSON'S ANALYSIS

If we purge *The Nature of Law* of its methodological essentialism, define and develop its functionalism, and expand its account of legal rules, then we can see the outlines of a challenging synthesis of legal positivism and sociological realism, with a gesture towards natural law. The features that Watson thinks typify law, after all, are just those that positivists stress: both view law as comprehensive, created, authoritarian, supreme, backed by sanctions, and regularly obeyed. Furthermore, Watson's view of the function of law—to settle disputes—is broadly shared by positivists and realists. At the same time, Watson's sociological concerns turn him away from the positivists' fascination with the formal, internal structure of legal systems, and towards the subtle and diverse ways legal systems shape, and are shaped by, other social institutions, including foreign legal systems.

Watson even acknowledges, however slightly, the perennial appeal of natural law. For law, Watson grants, possesses a set of particular virtues: formal enactment and publication of regulations; accessibility of the legal process; clarity of legal rules; rea-

<sup>102</sup> A. WATSON, *supra* note 1, at 112.

<sup>103</sup> *Id.*

soned decisions; established procedures, and consistency in legal judgments.<sup>104</sup> Unlike natural law theorists, however, he refuses to follow Lon Fuller in calling these moral virtues:<sup>105</sup> "the high value [that Watson attributes] to the 'particular virtues' derives from the concept of the essential functions of law and not from any arguments as to morality or justice."<sup>106</sup>

Why is Watson so reluctant to describe these particular virtues of law as moral? In the absence of any discussion of morality, it is difficult to say. My guess is that Watson believes that in order to have a descriptive theory of law one must avoid describing it from a moral point of view. If Watson's view is mistaken, or at least not essential, the way is open to argue that legal systems lacking one or more of these virtues, or possessing them only partially, are deformed, deficient, or deviant as legal systems. The way is also open to include two important virtues that Watson excludes because of their avowedly moral nature: equal treatment of disputants and proscription of *ex post facto* laws.<sup>107</sup>

## VII. CONCLUSION

*The Nature of Law*, despite its brevity, illuminates many of the principal issues in contemporary philosophy of law. Its claims are bold, far-reaching, and clearly expressed. It rightly stresses the signal importance of process to an understanding of law, although this preoccupation sometimes borders on obsession. In this way, perhaps, it mirrors the curriculum of many schools of law, which require courses in criminal procedure, for example, but not criminal law.

One cannot fail to learn about law and the legal process from Watson's book. Because it is informed by its author's command of Roman law, his understanding of modern sociological theories, and his familiarity with contemporary analytical jurisprudence, *The Nature of Law* brings together related interests that are too often kept apart.

*The Nature of Law*, despite and perhaps because of its flaws, deserves a wide audience. I especially hope that it finds its way into the hands of those who think that legal philosophy must be turgid, abstract, and irrelevant. Watson's book gives the lie to that old canard.

---

<sup>104</sup> *Id.* 61-69.

<sup>105</sup> See *supra* note 65 and accompanying text.

<sup>106</sup> A. WATSON, *supra* note 1, at 69.

<sup>107</sup> *Id.*







## JAMES O. FREEDMAN

*The editors of the University of Pennsylvania Law Review take great pleasure in dedicating this issue to the departing Dean of the Law School, James O. Freedman. Throughout his eighteen years at the University of Pennsylvania, Dean Freedman has demonstrated his total commitment to the Law School and to the University—as teacher, as scholar, and as administrator. The remarks of the distinguished contributors to this dedication illustrate the high esteem that friends and colleagues hold for Dean Freedman. The Law Review joins them in wishing Dean Freedman much success in his role as President of the University of Iowa and in all his future endeavors.*